No. 92-2038

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

ASGROW SEED COMPANY,
Petitioner,

v.

DENNY WINTERBOER and BECKY WINTERBOER,
d/b/a DEEBEES,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF AMICUS CURIAE OF THE AMERICAN SEED TRADE ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether Congress, in enacting the Plant Variety Protection Act to provide incentives for private development of novel seed varieties, included within the Act an exception to its terms that eviscerates the protection afforded seed developers by allowing farmers to sell as seed up to one-half of a crop grown from a protected variety, in competition with the developer.

2. Whether Congress, in providing that certain limited sales by a farmer of a protected seed variety would not infringe the Plant Variety Protection Act, also intended implicitly to provide that the farmer's failure to give notice that the seed was a protected variety under the Act would not infringe the Act's separate provision requiring such notice.

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STATEMENT OF INTEREST OF AMICUS CURIAE

The American Seed Trade Association ("ASTA") is a voluntary nonprofit national trade association representing approximately 560 research intensive companies engaged in the discovery, development, and marketing of new seed varieties.[1] ASTA members annually invest

[1] This brief is filed pursuant to S. Ct. Rule 37.3 with the consent of the parties. The consent letters have been filed with the Clerk.

millions of dollars in the research and development of new seed varieties to make American agriculture more productive and efficient. ASTA members also receive and hold the vast majority of plant variety protection certificates issued by the Plant Variety Protection Office of the United States Department of Agriculture. ASTA members thus incur the greatest losses caused by violations of the Plant Variety Protection Act, and have a direct stake in the correct interpretation of that statute. ASTA participated as amicus curiae in this case before the Court of Appeals for the Federal Circuit, and this Court granted ASTA's motion for leave to file a brief amicus curiae at the certiorari stage. 114 S. Ct. 50 (1993).

STATEMENT OF THE CASE

The facts are set forth fully in petitioner's statement of the case and ASTA will not repeat them here. We note, however, that the facts fit a familiar pattern, increasingly repeated not only in connection with protected soybean varieties but with respect to wheat, cottonseed, and a wide range of other sexually reproduced plants that form the basis of American agriculture. The activity of the Winterboers that led to the present litigation—purchase of seed protected under the Plant Variety Protection Act, growth of a crop with that seed producing many multiples of the original seed purchase, and then sale to other farmers of all or most of the crop as seed in unmarked brown bags in direct competition with the owner of the seed variety, rather than sale in the market as grain or feed—has become a persistent problem threatening the entire seed industry.[2]

[2] For example, petitioner Asgrow filed at least 18 suits in 1988-1991 to enforce its PVPA certificates for soybeans. *See* Joint Appendix 30-31, *Asgrow Seed Co.* v. *Winterboer*, 982 F.2d 486 (Fed. Cir. 1992). Delta and Pine Land Company was involved in three suits in 1992 alone in response to brown bagging abuses undermining its rights to cottonseed varieties. *See* Federal Circuit Brief for Amicus Curiae Delta and Pine Land Company Urging Affirmance of the Judgment 18, *Asgrow Seed Co.* v. *Winterboer*, *supra*.

In short, the facts of this case are hardly unique. They are part of a pattern replicated throughout the country and across the full range of sexually reproduced crops. This litigation is accordingly of concern far beyond Asgrow Seed Company and the Winterboers.

SUMMARY OF ARGUMENT

I. A. The continued well-being and international competitiveness of American agriculture depends in large measure on the development of new seed varieties that produce greater yields and are more resistant to adverse environmental conditions, disease, and agricultural pests. Prior to 1970, the bulk of research and development in the area of sexually reproduced crops—such as soybeans, wheat, and cotton—was conducted by university extension services and government entities. Extensive private commercial investment in new sexually reproduced plant varieties was not feasible, because farmers could grow and sell many multiples of the new seed variety after the initial purchase, precluding recovery by the private investor of its significant research and development costs.

The Plant Variety Protection Act, 7 U.S.C. §§ 2321-2582, was designed to and did change that. Prompted by the success of similar legislation in England, the Act afforded patent-like protection to new seed varieties, providing the private sector an opportunity to recoup the costs of developing the new varieties. The Act was a great success, giving birth to a new era for the American seed industry. The protection afforded by the Plant Variety Protection Act offered an incentive to persist in the financially risky endeavor of trying to develop new and better seed varieties, and private funds poured into the development of new varieties. Not all research culminated in the marketing of a new variety, and not all of the new varieties that were marketed were commercially successful. When one was not, the investor lost money. But there was a dramatic increase in the number of commercially available new varieties offering greater yields and

crops more resistant to disease and pestilence. University extension services and government funding were able to be redirected to more basic research, while the private sector took up the task of developing progressively better seed varieties for the commercial market.

B. With the success of the Act and the boom in the private seed industry, however, a significant abuse of the Act developed. Farmers began selling all or portions of a crop derived from a seed variety protected under the Plant Variety Protection Act for use as seed, cutting into the supposedly protected market of the breeder. The farmer incurred none of the extensive research and development costs of the seed company, and accordingly could underprice the company by a wide margin. *See* Pet. 4 n.2. This practice—known as "brown bagging"—undermined the entire structure of the Act, for it removed the critical financial incentive for private sector investment in the first place.

The natural consequences of removing the financial incentive are increasingly evident throughout the seed industry. Companies that had established new research programs and invested millions of dollars after passage of the Plant Variety Protection Act found that, time after time, the promised financial rewards failed to materialize due to brown bagging. This was not because the seed varieties they developed were unsuccessful—the varieties became predominant in terms of the number of acres planted. The problem was that only a small portion of the seed necessary to plant those acres was purchased from the "protected" certificate holder under the Plant Variety Protection Act. The rest came from brown bagging. With the promised protection of the Act being eaten away by brown bagging abuses, company after company—Anderson Clayton, Cargill, Agrigenetics, Agripro, Jacob Hartz, Northrup King, Pioneer Hi-Bred, Delta and Pine, Golden Harvest, Stoneville Pedigreed, DeKalb, and others—was forced to abandon seed development programs and shut down research facilities.

C. The decision below, by construing the statute to permit farmers to sell as seed up to 50 percent of a crop grown from a protected variety, legitimizes much of the brown bagging that has already occurred and will certainly encourage even more. The end result will plainly be, as Judge Newman pointed out, to "nullif[y] the Plant Variety Protection Act as an incentive for innovation in agriculture." Pet. App. 30a (dissenting from denial of rehearing in banc). Although the immediate impact will be on the seed industry, the long-term consequences will be borne by farmers themselves, who will have fewer and less beneficial seed varieties to choose from, and by consumers, who will no longer enjoy the benefits of agricultural innovation.

As explained by the petitioner, nothing in the language of the statute requires such a result. Indeed, the language instead compels an interpretation limiting the amount of protected seed a farmer may sell to the amount saved to grow another crop. Such a construction effectively prevents farmers from going into competition with the owners of seed varieties, while allowing a farmer to engage in the traditional practice of saving enough seed for next year's crop or selling such saved seed to a neighbor if his own planting plans change. Such a construction also serves the underlying purpose of the Plant Variety Protection Act by ensuring that the incentive to develop new and better varieties is not eviscerated by an exception swallowing the rule.

II. The Federal Circuit's error in construing the saved seed exemption of Section 2543 was compounded by its conclusion that seed sold under that exemption—in whatever amount—was exempt from the notice requirement of 7 U.S.C. § 2541(6). Section 2541(6) specifies that it is an act of infringement to "dispense" a novel variety without notice of its protected status. The saved seed exemption provides that *sales* within its terms do not infringe any rights of the owner of a protected seed variety, but the issue of *notice* is an entirely separate question. In an

action for infringement under Section 2541(6), the owner's claim is not that the *sale* of the seed violated the statute, but that the dispensing of the seed without notice did so. Nothing in Section 2543 bars such an action.

This is not only a natural reading of the statutory language, but also a necessary one to give effect to Congress' purposes in enacting the PVPA. The notice requirement of Section 2541(6) is a key to effective enforcement of the Act. Once a protected seed variety enters commerce without the requisite notice, however, it becomes exceedingly difficult for the owner of the variety to enforce its rights against those growing and marketing the variety. There is no valid reason to exempt sales under Section 2543 from the notice requirement applicable to all other sales or dispensations of a protected variety; only if the seller or buyer or both are engaged in illicit activity will there be reason to sell the seed in an unmarked, brown bag.

ARGUMENT

I. THE ERRONEOUS CONSTRUCTION BELOW NULLIFIES CONGRESS' PURPOSE IN ENACTING THE PLANT VARIETY PROTECTION ACT OF PROVIDING ADEQUATE INCENTIVES FOR PRIVATE DEVELOPMENT OF NEW SEED VARIETIES

A. The PVPA Gave Birth To A New Era For The American Seed Industry By Providing An Incentive For Research And Development

The American seed industry engages in research and development to produce novel seed varieties offering farmers higher yields and crops more resistant to adverse environmental conditions, disease, and pestilence. The need for new and better seed varieties is a continuous one. The prospect of ever-increasing yields prompts ongoing efforts, as does the need to respond continually to evolving disease and insect threats.[3]

Most agricultural crops are reproduced through either self or cross pollination. Self pollinated crops include soybeans, wheat, and cotton; cross pollinated crops include corn and sorghum. Prior to enactment of the Plant Variety Protection Act in 1970, the American seed industry devoted the bulk of its resources to cross pollinated crops, which were easily hybridized. The reason was simple: hybridized crops do not generate seeds that can be replanted or sold to grow another crop with the same characteristics. The developer of a successful hybrid therefore had inherent protection and a market for his product year after year, allowing him the opportunity to recoup the investment necessary to develop the hybrid in the first

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[3] For example, new rust diseases—a particular threat to wheat crops—appear about every five years. The demand for new varieties resistant to those diseases therefore follows a similar pattern. *See* Economic Research Service, United States Department of Agriculture, *Intellectual Property Rights and the Private Seed Industry*, Agricultural Economic Report No. 654, at 8 (Nov. 1991).

place. *See* H.R. Rep. No. 1115, 96th Cong., 2d Sess. 4 (1980).

The Plant Patent Act of 1930 reinforced this inherent protection, authorizing the developer of a new variety of an asexually reproduced plant to obtain a patent for the new variety. 35 U.S.C. § 161. The Plant Patent Act, however, was specifically limited to asexually reproduced plants. *See Diamond v. Chakrabarty*, 447 U.S. 303, 310-313 (1980).

The developer of a novel variety had no protection with respect to sexually reproduced plants. Once the new seed was sold, any farmer could grow a crop with it, generating many times the number of seeds originally purchased. *See* Pet. 3 (one bushel of soybean seeds produces 45 bushels of the same seeds). Because he did not incur the extensive research and development costs necessary to produce the novel variety, the farmer could sell the second-generation seed in competition with the developer at a much lower price. *See* Pet. 4 n.2 (Winterboers sold Asgrow's protected variety for eight dollars per bushel less than Asgrow).

The research and development costs can be daunting to an investor considering developing a new plant variety. As the House Agriculture Committee explained in 1980:

> The development of a new plant variety with a higher yield or a greater resistance to a specific disease is an arduous task. In some cases, thousands of crosses must be made, documented and tested. The breeder may often spend years creating a breeding program to develop a new variety, with no guarantee of success. Once a new variety with commercial potential is developed, the developer must invest in advertising, distribution, production and all the other costs of operating a business, which will ultimately determine the profitability of the venture. [H.R. Rep. No. 1115, *supra*, at 4.]

Given these costs and risks, and the lack of any prospect of a return even if the new variety turned out to be successful, it is not surprising that private seed breeding efforts were largely limited to cross pollinated crops. Such research and development that did take place with respect to self pollinated crops was undertaken by university experiment stations and government entities, at taxpayer expense. *Ibid.*

The Plant Variety Protection Act was intended to change that, by "assuring the developers of novel varieties of sexually reproduced plants of exclusive rights to sell, reproduce, import, or export such varieties" for a set period of years. H.R. Rep. No. 1605, 91st Cong., 2d Sess. 1 (1970); S. Rep. No. 1138, 91st Cong., 2d Sess. 1 (1970).[4] The Act was prompted by developments in Western Europe, where legal protection for plant varieties had resulted in "a great flowering of plant breeding, with the concomitant benefits of a more productive national agriculture and improved agricultural export." H.R. Rep. No. 1605, *supra*, at 1-2. In England, for example, the Plant Varieties and Seeds Act of 1964 led to "a great upsurge of plant breeding," causing "a once moribund seed industry [to] show[] signs of great new vitality." *Id.* at 2.

Congress sought to achieve the same benefits for American agriculture. The key objective was to "stimulate private plant breeding," so that public expenditures could be redirected to basic research. *Ibid.* That meant ensuring private developers an opportunity to secure a return on their extensive research and development costs, by protecting their rights in novel varieties they developed and providing a remedy for infringement of those rights.

The PVPA had its intended effect. When the House Agriculture Committee looked at the Act ten years after it was enacted, the Committee noted that "[p]rivate in-

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[4] The original period was 17 years, amended to 18 years in 1980. 7 U.S.C. § 2483(b).

vestment in varietal development research has increased dramatically since passage of the [Act]." H.R. Rep. No. 1115, *supra*, at 5. An analysis of the number of new plant varieties showed that three times more wheat and soybean and six times more cotton varieties were developed in the decade after enactment of the Act than in the decade before. *Id.* at 4. Another report showed the number of private soybean and wheat varieties for sale rising from three to 36 from 1970 to 1979. Economic Research Service, United States Department of Agriculture, *Intellectual Property Rights and the Private Seed Industry*, *supra*, at 2. Yet another analysis found that "the PVPA has had a significant impact on private variety research," particularly with regard to soybeans, where there was a "dramatic increase in the number of private soybean breeding programs." R. Perrin, *et al.*, *Some Effects of the U.S. Plant Variety Protection Act of 1970*, Economics Research Report No. 46, Department of Economics and Business, North Carolina State University, at 28, 31 (August, 1983). Other analyses also reflect the tangible benefits in research and productivity flowing from passage of the Act. *See, e.g.*, A. Tallard, ed., *A Workshop Report: An Evaluation of the Issues, Challenges, and Opportunities Related to Plant Patenting*, 10-11 (Jan. 31-Feb. 3, 1989).

B. Brown Bagging Has Eviscerated The Incentive Provided By The PVPA And Led To Abandonment Of Research Programs

The brown bagging abuses at issue in this case have undermined the incentives created by Congress for private investment in research and development programs. Throughout the seed industry, the growth of brown bagging has led to the curtailment or abandonment of the sort of development programs the PVPA was designed to encourage. The interpretation of the saved seed exemption adopted by the court below legitimizes such abuses and—if allowed to stand—will inevitably result in dra-

matically reduced investment in development of new and better seed varieties.

If any farmer can sell up to one-half of a crop planted with a "protected" variety as seed, the supposedly "exclusive rights to sell, reproduce, import, or export such varieties" guaranteed to the developer will become a fiction. H.R. Rep. No. 1605, *supra*, at 1. Without such rights, the developer will be unwilling to incur the significant expense and undertake the commercial risk to discover and develop the novel variety in the first place. For, as USDA's Economic Research Service explained, "[i]t is the ability of seed firms to make an adequate return on their research and development that encourages such firms to develop new and better varieties." Economic Research Service, United States Department of Agriculture, *Intellectual Property Rights and the Private Seed Industry*, *supra*, at 7.

The extent and impact of brown bagging abuses is well documented. The Agrigenetics Company, for example, markets 151 seed varieties in 12 different species. It operates several research facilities in the United States, and invests some 17 million dollars in seed research annually. One of Agrigenetics' priorities was a research program involving stripper cotton. After an investment of several million dollars, the program culminated in the introduction of GSA 71, a variety so popular it accounted for some 16 percent of all cottonseed acreage planted in the United States. Agrigenetics was compelled to abandon the program and its further efforts to improve the quality of stripper cotton, however, because while 16 percent of all cottonseed acreage was planted with GSA 71, the company had only sold enough of its protected seed to cover five percent of the acreage planted. Brown bagging accounted for the rest.[5]

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[5] *See* Federal Circuit Brief for Amicus Curiae the Agrigenetics Company, *Asgrow Seed Co.* v. *Winterboer*, *supra*.

An Agrigenetics program to develop new varieties of hard red winter wheat met a similar fate. The program was begun in 1981 and involved an investment of more than four million dollars over the next five to six years. Although Agrigenetics developed a dozen new varieties and considerable amounts of its seed were being planted by farmers throughout the Great Plains, it soon became apparent that farmer replant and brown bagging were so prevalent that it would not be profitable to continue the program. Agrigenetics discontinued not only sale of its wheat seed varieties but the entire research program as well.[6]

Other seed companies have had similar experiences with brown bagging. Agripro Biosciences Inc. ("Agripro"), for example, sells 28 varieties of wheat protected under the PVPA. It commits over six million dollars per year to new product development, and employs 111 employees in its new product research program. This research program came into existence only after passage of the PVPA, and depends upon the protections afforded by the Act.

In recent years, however, brown bagging has threatened the viability of the research program. For example, 30 percent of all acres planted with wheat in Kansas in 1989-1990 were planted with Agripro seed. Although this would suggest that the Agripro research program has been very successful, it turns out that authorized sellers sold only enough protected Agripro seed to plant five percent of the acres. Agripro thus secures a return on its research and development investment in this area 83 percent less than that intended by Congress when it passed the PVPA.[7]

This experience is quite common. Jacob Hartz Seed Co. Inc. ("Hartz"), for example, holds 18 certificates

[6] *Ibid.*

[7] *See* Federal Circuit Brief of Agripro Biosciences Inc. as *Amicus Curiae* Urging Affirmance, *Asgrow Seed Co.* v. *Winterboer, supra.*

under the PVPA for soybean varieties. One of its varieties—"Hartz 5164"—is the most widely planted soybean variety in Arkansas. Hartz sells, however, no more than one-third of the seed used to grow that variety in Arkansas. Some of the shortfall is due to legitimate farmer replant, permitted under the Act, but the bulk of it is due to brown bagging abuses.[8]

Northrup King Company abandoned several significant seed research programs because of brown bagging. Northrup King sells approximately 185 varieties of seed and invests more than ten million dollars annually in research and development of new seed varieties. Through research facilities in Montana, Nebraska, Kansas, Minnesota, Arizona, Washington, and South Carolina, Northrup King developed several varieties of wheat, including a popular variety of hard red spring wheat known as Prodax. Prodax accounted for some 300,000 of the acres planted to hard red spring wheat in Montana in the early 1980s. Northrup King had sold, however, only enough of its protected seed to account for 22,000 acres of crop. Accordingly, Northrup King abandoned the research program, because the return it was entitled to under the PVPA was being eviscerated by brown bagging. Northrup King abandoned a stripper cottonseed program in Texas and a southern soybean program in South Carolina for the same reason.[9]

Brown bagging abuses have also plagued the research programs undertaken by Pioneer Hi-Bred International, Inc. The 1991 Doane U. S. Farm Soybean Seed Study found that the difference between Pioneer PVPA protected soybean units planted and units sold was 2.7 million, a loss of some 35 million dollars. Kansas agricul-

[8] *See* Federal Circuit *Amicus Curiae* Brief of Jacob Hartz Seed Co. Inc. Urging Affirmance of the Decision Under Review, *Asgrow Seed Co.* v. *Winterboer, supra.*

[9] *See* Federal Circuit Brief for *Amicus Curiae* Northrup King Co., *Asgrow Seed Co.* v. *Winterboer, supra.*

ture statistics published in 1989 show Pioneer sales of its PVPA protected hard red winter wheat seed, variety 2157, accounted for only eight percent of the acreage planted to that variety, with brown bagging sales accounting for the other 92 percent. Not surprisingly, this led to a 1989 loss of 3.5 million dollars for Pioneer on its wheat sales, and in 1990 Pioneer discontinued its hard red winter wheat program.[10]

Delta and Pine Land Company holds twenty certificates under the PVPA for cottonseed and ten for soybeans. Over the five-year period ending in 1991, Delta and Pine invested 4.5 million dollars on cottonseed research and 3.6 million dollars on soybean research. Brown bagging abuses, however, have forced the company to abandon programs in each of these areas. Delta and Pine was compelled to close its cottonseed research facility in Lubbock, Texas—in the heart of the Texas High Plains cotton area—after the facility lost nearly one million dollars over a four-year period, primarily due to brown bagging. By the same token, the company was recently forced to close its soybean research facility in Wilson, North Carolina—eliminating one-half of its soybean research efforts—because of the adverse economic effect of brown bagging.[11]

Numerous other companies have reported curtailment of research programs. After initiating testing on soft winter wheat varieties in the mid-1980s, Golden Harvest Seeds, Inc., abandoned further varietal development plans. It determined that brown bagging would prevent it from recouping the necessary investment. Golden Harvest also decided not to add an additional soybean research station in the western United States for the same

[10] *See* Federal Circuit Brief for *Amicus Curiae* Pioneer Hi-Bred International, Inc., *Asgrow Seed Co.* v. *Winterboer, supra.*

[11] *See* Federal Circuit Brief for *Amicus Curiae* Delta and Pine Land Company Urging Affirmance of the Judgment, *Asgrow Seed Co.* v. *Winterboer, supra.*

reason.[12] By the same token, Stoneville Pedigreed Seed Company decided to forego its research program in Lubbock, Texas, because of brown bagging, and has affirmed that it will not allocate research expenditures to the Texas cottonseed market so long as brown bagging abuses continue to plague that market.[13] DeKalb Plant Genetics has curtailed its efforts to develop improved soybean varieties, the Anderson Clayton Company terminated a soybean program designed to develop new soybean varieties adapted to West Texas, and Cargill abandoned a cottonseed research program—all because of the inability to recoup investment due to brown bagging abuses.[14]

Indeed, the ironic fact is that the originator and certificate holder of a very successful new variety will probably sell a lesser percentage of the seed than the originator of a less successful variety. The more popular a particular variety is, the more likely that it will be a target of brown bagging abuses. *See* Office of Technology Assessment, *New Developments in Biotechnology: Patenting Life*, Special Report, OTA-BA-370, at 79 (GPO 1989).

C. The Erroneous Construction By The Federal Circuit Sanctions Brown Bagging Abuses And Nullifies The Protection Afforded By The PVPA

The foregoing are simply a few examples of the dramatic, concrete practical impact brown bagging abuses have had on the sort of research and development programs Congress intended to promote through the PVPA. Quite

[12] *See* Federal Circuit Brief for *Amicus Curiae* Golden Harvest Seeds, Inc. in Support of Plaintiff-Appellee, *Asgrow Seed Co.* v. *Winterboer, supra.*

[13] *See* Federal Circuit Brief for *Amicus Curiae* Stoneville Pedigreed Seed Company in Support of Appellee Urging Affirmance of Judgment of U.S. District Court, *Asgrow Seed Co.* v. *Winterboer, supra.*

[14] *See* Federal Circuit Brief *Amicus Curiae* of DeKalb Plant Genetics Urging Affirmance of the Judgment Under Review, *Asgrow Seed Co.* v. *Winterboer, supra.*

simply, the statute does not work if extensive brown bagging is permitted, because brown bagging abuses take away the very financial incentive the Act confers on breeders. The decision below—by legitimizing brown bagging of up to 50 percent of any farmer's crop—will, if allowed to stand, render the PVPA a dead letter. *See* Pet. App. 30a (decision below "nullifies the Plant Variety Protection Act as an incentive for innovation in agriculture") (Newman, J., dissenting from denial of rehearing in banc).

The question then becomes whether Congress enacted a statute that contained within it the seeds of its own destruction. The presumption, of course, is that Congress did not engage in a useless exercise when it enacted the statute. As the Court has recognized since its earliest days, "[o]ne portion of a statute should not be construed to annul or destroy what has been granted by another." *Peck* v. *Jenness*, 48 U.S. 612, 623 (1849). *See Astoria Federal Savings & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 112 (1991) ("we construe statutes, where possible, so as to avoid rendering superfluous any parts thereof"); *Rosado* v. *Wyman*, 397 U.S. 397, 415 (1970) ("courts should construe all legislative enactments to give them some meaning").

Instead the statute should be interpreted—if the language permits—in a manner consistent with its underlying purpose. *See United States Nat'l Bank of Or.* v. *Independent Ins. Agents*, 113 S. Ct. 2173, 2182 (1993) ("Over and over we have stressed that '[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy") (quotation omitted); *Crandon* v. *United States*, 494 U.S. 152, 158 (1990) ("In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy"); *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of the

statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole").

As explained by the petitioner, a natural reading of the statutory language leads to the result that the saved seed exception limits a farmer's right to sell another's protected variety to the amount needed for next year's crop. Such a reading—unlike that adopted by the Federal Circuit—also permits the Act to achieve its intended purpose, and is consistent with the "object and policy" of the Act and the "design of the statute as a whole."

The Fifth Circuit recognized the need to read the saved seed exemption in light of the purposes of the PVPA as a whole in *Delta and Pine Land Co.* v. *Peoples Gin Co.*, 694 F.2d 1012, 1016 (5th Cir. 1983):

> The broader the construction given the exemption, the smaller the incentive for breeders to invest the substantial time and effort necessary to develop new strains. The less time and effort that is invested, the smaller the chance of discovering superior agricultural products. If less time and effort is invested, long-term benefits to the farmer in the form of superior crops and higher yields will be lost.

The Federal Circuit's decision represents a crippling blow to the entire American seed industry. Research and development of new plant varieties will continue to be curtailed or abandoned altogether. To the extent the industry remains active in research, funds will be diverted to cross pollinated plants, or overseas, where the protection for developers is more secure. The experience prior to 1970 confirms that public funding of research and development is an inadequate substitute for private sector involvement, even indulging the unlikely assumption that public funding at any significant level would be available given current budget realities. The international competitiveness of American agriculture—a key component of American world trade—will suffer at a time when

world-wide competition in the agricultural area is becoming increasingly intense.

The Plant Variety Protection Act, if properly interpreted, would achieve the congressional purpose of avoiding these adverse consequences and permit the American seed industry to flourish once more. This Court should reverse the Federal Circuit and restore the Act that Congress both intended and enacted.

II. THE SAVED SEED EXEMPTION PROVIDES AN EXEMPTION FOR CERTAIN OTHERWISE PROHIBITED SALES, NOT FOR VIOLATIONS OF THE NOTICE PROVISION

This Court also granted certiorari on a second question: whether those sales that are authorized under the saved seed exemption remain subject to the provision of the Plant Variety Protection Act specifying that it is an infringement of the rights of the owner of a novel variety to "dispense the novel variety to another, in a form which can be propagated, without notice as to being a protected variety under which it was received." 7 U.S.C. § 2541(6). A careful reading of the saved seed exemption establishes that it furnishes no immunity for violations of this notice provision. Such a reading is not only compelled by the language of the exemption, but also by Congress' purpose in enacting the PVPA.

The saved seed exemption provides that "it shall not infringe any right hereunder" for a farmer to use "saved seed" within the meaning of the exemption "in the production of a crop for use on his farm, or for sale as provided in this section." 7 U.S.C. § 2543. The import of this statutory language is that it does not violate the Act for a person to use saved seed—subject to the limitation in the exemption, *see* p. 17, *supra*—for growing his own crops or for sale. Nothing in this language suggests that it also does not violate the Act for the person to fail to give the notice required under 7 U.S.C. § 2541(6). Section 2543 specifies that saving seed or selling such saved

seed is not a violation. An action for violating the notice provision would not claim, however, that the defendant's acts of saving or selling violated the Act, but rather that the failure to provide the requisite notice did so.[15]

Giving or failing to give notice is an act separate from the act of selling saved seed. Seed can be sold with or without notice, and the notice provisions apply whether or not there is a sale. The statute prohibits "dispens[ing]" without notice, not simply selling without notice. An exemption specifying that acts of selling will not infringe any rights does not speak in any way to the question of liability for failure to give notice.

To illustrate the principle, an amnesty providing that no one would be prosecuted for acts of trespass committed at a particular location on a particular day would not immunize from prosecution a defendant discovered to have committed murder, even if the murder occurred during the immunized trespassing. So too here the immunity from infringement actions conferred by Section 2543 for certain acts of selling in no way confers immunity for failure to give required notice when dispensing a protected variety, even if the failure to give notice accompanied an immunized sale.

The notice requirement in Section 2541(6)—the counterpart of marking provisions in patent and copyright law—is a key to effective implementation of the PVPA. As is true with respect to intellectual property generally, once a protected seed variety enters commerce without the requisite notice, it becomes exceedingly difficult for the owner of the variety to enforce its rights against those growing and marketing the variety. *Cf.* 7 U.S.C. § 2567 (if protected variety distributed by owner and received by infringer without notice label, proof of actual notice to infringer required). Yet effective enforcement is the

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[15] Asgrow's complaint separately alleges that the Winterboers dispensed the protected varieties without the notice required under 7 U.S.C. § 2541(6). *See* J.A. 38-39.

key to the implementation of any scheme of property protection. There is simply no valid reason to exempt sales under Section 2543 from the notice requirement applicable to any other sale of a protected variety, and neither the Federal Circuit nor the Winterboers have suggested any. Requiring notice does not inhibit permissible sales under that Section; indeed, if the seller is in fact acting legitimately, he ought to *want* to emblazon his brown bags with the fact that the seed he is selling is a protected variety. Only if the sale is actually outside the exemption of Section 2543, or if the seller is a willing co-conspirator with the buyer who plans to market a crop grown from the seed as seed, is there a reason for the participants in the sale to avoid notice.

Here again the Court is presented with a natural reading of the statute that is consistent with the over-all structure of the Act and also necessary to implement the legislative purpose. *See* cases cited at pp. 16-17, *supra*. This Court should adopt that reading to ensure that the statute enacted by Congress remains capable of effective enforcement, as intended by Congress.

CONCLUSION

For the foregoing reasons, and those in the Petitioner's brief, this Court should reverse the decision below.

Respectfully submitted,

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